

MEMORANDUM

**COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Water Division**

Subject: GUIDANCE MEMORANDUM 02-2011

Clarification of Farm or Stock Pond Exemption from Virginia Water Protection Permit Program Requirements

To: Regional Directors

From: Larry G. Lawson, P.E., Director



Date: July 3, 2002

Copies: Regional Permit Managers, Regional Compliance and Enforcement Managers, Regional VWPP Supervisors, Mary Jo Leugers, Martin Ferguson, Ellen Gilinsky

Summary:

This guidance clarifies the exclusion of farm and stock ponds from Virginia Water Protection (VWP) permitting requirements, as contained in 9 VAC 25-210-60(9). The guidance differentiates between impoundments and ponds, and provides that the farm and stock pond exemption applies only to structures built to gather and store surface water, that do not capture the flow of or include the channel of a permanent or intermittent stream, and are located on an agricultural property. An agricultural property is defined as a property five acres or greater in size that supports an agricultural operation according to Section 3.1-22.29B of the Code of Virginia.

Contact information:

Please contact Ellen Gilinsky, Virginia Water Protection Permit Program Manager, at 804-698-4375 with any questions about the application of this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, It does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

CLARIFICATION OF FARM AND STOCK POND EXEMPTION

FROM

VIRGINIA WATER PROTECTION PERMIT PROGRAM REQUIREMENTS

PURPOSE AND BACKGROUND

The purpose of this guidance is to clarify the exclusion of farm ponds from Virginia Water Protection (VWP) permitting requirements. Section 9 VAC 25-210-60 of the VWP regulation details the activities that do not require a VWP permit. Included in this section as Exclusion #9 is:

"Construction or maintenance of farm or stock ponds (emphasis added) or irrigation ditches, or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exclusion. The maintenance dredging of existing ditches is included in this exclusion provided that the final dimensions of the maintained ditch do not exceed the average dimensions of the original ditch. This exclusion does not apply to the construction of new ditches or to the channelization of streams. "

This exclusion parallels the exclusion found in federal regulations with regard to the need for a Clean Water Act Section 404 permit for impacts to surface waters, including wetlands, for certain activities. 33 CFR 323.4 (3) generally exempts the construction or maintenance of farm or stock ponds from the requirement for a Section 404 Permit. However, 33 CFR 323.4(c) does not exempt activities "whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced". This clause is known as the "recapture provision" because it modifies the exemption, allowing the Corps to regulate certain types of farm ponds. The Virginia regulations do not include this recapture language.

EXISTING WATER PROGRAM DEFINITIONS

The Office of Water Permit Support Guidance Document No. 01-2012 defines ponds and impoundments as follows:

Impoundment : a structure, regardless of its size or intended use, to gather and store surface water that captures the flow of, and is constructed in the channel of, a permanent or intermittent stream

Pond: a structure to gather and store surface water that may or may not be constructed to include the channel of ephemeral streams. A pond does not capture the flow of and does not include the channel of a permanent or intermittent stream.

The various types of streams are defined as follows in that same guidance:

Permanent stream: a waterway that contains water at all times during a typical year and that has,

or could have, a well established aquatic community

Intermittent stream: a waterway that contains flowing water at times during a typical year when groundwater provides water for the stream flow, but does not contain water at all times, particularly during dry periods. These streams are likely to have an active aquatic community for at least part of the average year.

Ephemeral stream: a waterway such as a drainage way, ditch, hollow or swale that contains water only during or for a short duration after precipitation events in a typical year.

DEFINITION OF A FARM POND FOR THE PURPOSES OF THE VWP REGULATION

The Office of Water Programs has defined through previous guidance the distinction between a pond and an impoundment, and the VWP Program will incorporate these definitions.

In terms of what defines a farm, the USDA defines a farm for census purposes as any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year. However, the definition of farm is not found specifically in state law. State tax law states that for taxing purposes a farm has to be five acres or greater. The Code of Virginia Section 3.1-22.29 B defines an agricultural operation as " any operation devoted to the bona fide production of crops, or animals, or fowl, including but not limited to the production of fruits and vegetables of all kinds; meat, dairy or poultry products; nuts, tobacco nursery and floral products; and the production and harvest of products from silviculture activity".

Based on the above information, and consistent with the intent of the farm or stock pond exemption in Virginia's VWP regulation, any structure that intercepts and captures the flow of a permanent or intermittent stream, whether or not it is used for agricultural purposes, is not considered a pond and therefore does not qualify for the farm and stock pond exemption under 9 VAC 25-210-60. This is consistent with the statutory mandate for the VWP regulation as contained in Code of Virginia Section 62.1-44.5 A , which states that "Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to: ...3. Otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal and aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses;". Impoundments are not included in this exemption, as by their nature they are usually greater in size than a pond, affect the reach and circulation of a stream, and can cause downstream effects on water quality.

A farm or stock pond is therefore defined as a structure to gather or store surface water, that does not capture the flow of and does not include the channel of a permanent or intermittent stream, and is located on a property five acres or greater that is defined as an agricultural operation per the Code of Virginia Section 3.1-22.29 B.